BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

QA29525

COMPUTER RESERVATIONS SYSTEM REGULATIONS - Advance Notice of Proposed Rulemaking	Docket OST-97-2881-54

Comments of WORLDSPAN, L.P.
on Advance Notice of Proposed Rulemaking

Communications with respect to this document should be sent to:

DOUGLAS L. ABRAMSON
DARA S. REDLER
WORLDSPAN, L.P.
300 Galleria Parkway
Atlanta, Georgia 30339
(770) 563-5202

RAYMOND J. RASENBERGER
CHARLES D. SIMPSON
Zuckert, Scoutt & Rasenberger
888 Seventeenth Street, N.W.
Suite 600
Washington, D.C. 20006
(202) 298-8660
Counsel for WORLDSPAN, L.P.

December 9, 1997

13pgs.

A. SUMMARY.

WORLDSPAN LP submits these comments in response to the Advance Notice of Proposed Rulemaking, Notice No. 97-9.

In summary, Worldspan's position is as follows:

1) Part 255 on the whole embodies a set of rules which are necessary to help preserve airline competition and protect consumers. However some changes in the rules are needed.

2) The current rules, although generally applicable to Internet bookings, are not as specific as they could be. Misleading and biased screen displays on Internet services need to be prohibited unequivocally.

3) The rules limiting subscriber contracts to five years need to be clarified to prohibit a de facto extension of the whole contract if new equipment is added or other changes are made during the original term of the contract.

4) Changes in rules and procedures are necessary to give U.S. CRSs a fair and equal opportunity to compete in foreign markets. Mandatory participation should be required of all airlines which market a rival CRS in another country, whether or not the airline has an ownership interest in the CRS. Specific bilateral agreements assuring a fair equal opportunity for CRSs to compete should be pursued aggressively and IATFCPA procedures should be made available to U.S. CRSs to permit DOT to act promptly to obtain fair treatment. Existing exemptions allowing separate algorithms for services outside the U.S. should be made permanent.

5) Certain changes being proposed in the rules do not have merit and would detract from the goal of a fully competitive marketplace for CRS services. These include proposed new regulations pertaining to booking fees, and additional limitations on distribution of passenger information.

B. PART 255 SHOULD BE EXTENDED FOR A FURTHER PERIOD WITH CERTAIN REVISIONS.

Part 255 is based primarily on former section 411 of the Federal Aviation Act, now 49 USC 41712. That section creates the Department's jurisdiction, and, in a sense, its obligation, to correct unfair or deceptive practices and unfair methods of competition by air carriers, foreign air carriers and ticket agents. As the record shows, Part 255 was necessitated by both deceptive practices, e.g. biased screen displays, and unfair methods of competition by airlines which owned computer reservations systems.

WORLDSPAN does not concur in every CRS regulatory decision the Department has made since the Rules were adopted, but it recognizes that Part 255 is essential in an industry where a relatively few CRS-owning airlines have been in a position to use CRS power to mislead the public and injure competitors.

Nothing that has happened in the five-year period since the Rules were last renewed warrants abandoning them now. The airline industry is still highly competitive but, in the absence of CRS Rules, anti-competitive, anti-consumer behavior using CRS power can

be expected to resume. This is true even though, in some cases, the ownership of CRSs by airlines has become more attenuated.

Further, the need to insure that CRS displays remain unbiased has grown as CRS use has expanded beyond travel agents to the ultimate consumer. The CRS rules have significantly eliminated bias in displays offered to travel agents, but many more individuals and businesses are accessing Internet displays. The current CRS rules arguably prohibit biased Internet displays, but it is important that the Department make that clear, with Rule revisions in this proceeding.

If for no other reason than this, a review of the CRS Rules is now timely. In WORLDSPAN's view, the basic concept and principle provisions of the Rules must be retained. However, some refinements and clarifications of elements of Part 255 is necessary. First, as stated above, new issues which have developed from greater use of new technology such as the Internet need to be addressed. Second, the Department must address issues of interpretation or application of the rules, whether or not related to advances in technology, which have come to the fore since the 1992 revisions.

WORLDSPAN's views on potential areas of revision are as follows.

C. THE CRS RULES SHOULD APPLY TO ALL INTERNET DISPLAYS WHICH ~~AE~~ HELD OUT AS NEUTRAL.

The most significant development relating to CRSs since the current rules were adopted has been the proliferation of booking services offered to consumers and others through the Internet. An

enormous variety of new displays as well as booking and ticketing services are now available, including services by individual airlines and third parties not using a CRS database.

WORLDSPAN regards the array of new options available to consumers through the Internet as a positive development overall. For air travellers it offers convenient round the clock access to travel information and booking services. For airlines, it offers new more economical methods of distribution. While more difficult to predict, the impact on travel agents could also be positive. Agents have facilities, information and expertise which is hard to find elsewhere. They are in a unique position to offer their products on the Internet.

WORLDSPAN and other CRSs now offer booking services directly to the public through their own websites. WORLDSPAN also contracts with other persons and travel agents to supply their own websites with CRS data and functionality. Until now, WORLDSPAN has considered such Internet-related services as subject to Part 255 wherever it might apply. However, Part 255 does not specifically deal with CRS services to Internet providers. DOT should set forth, with reasonable specificity, its views on what rules apply to Internet CRS services. At a minimum, the Department should make clear that the rules against display bias are applicable to any Internet integrated display that holds itself out as a neutral.

Preemption of non-federal regulation: WORLDSPAN is concerned that Internet displays of airline services may attract state or local regulation. Obviously, a patchwork of non-federal

regulations would create enormous problems and diseconomies for CRSs and third party providers of CRS information. As discussed in the footnote,[1/] the law leaves no room for non-federal regulation of any reservations services offered via the Internet. Nevertheless, it would be useful if DOT, in issuing revised rules, specifically stated that its rules preempt state and local regulation.

D. THE MANDATORY PARTICIPATION RULE SHOULD BE STRENGTHENED IN ANY EVENT.

As the Department knows, system owners have in the past sometimes withheld or delayed providing information to competing systems while providing it to their own. But for the mandatory

---

[1/] The Federal Aviation Act, as codified, declares that no state may enact any provision of law related to a price, route, or service of any air carrier." 49 U.S.C. § 41713 (b) (1). (emphasis added) Construing the predecessor of § 41713, at least one court has held that "[f]ederal law preempts state laws regulating the provision of CRS services and the relation between travel agents and CRS providers." Frontier Airlines, Inc. v. United Air Lines, Inc., 758 F. Supp. 1399, 1408 (D. Colo. 1989); see also Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383-84 (1992) (holding that the Act explicitly preempts all state regulations if they have a connection with, or a reference to, airline rates, routes, or services). Moreover, the Department's own extensive oversight of CRS services supports the conclusion that -- regardless of § 41713 -- the federal government has occupied the CRS field, thus displacing state regulation. See American Airlines, Inc. v. Alaska Airlines, Inc., No. 4:94-CV-595-Y, slip op. at 14 (N.D. Tex. September 18, 1996) (finding the DOT's "heavy activity" in functions); Frontier, 758 F. Supp. at 1409 (citing 14 C.F.R §§ 255.1-255.8 as evidence of federal intent to preempt claims based on state statutes). And, in an area that lies within its statutory power to regulate, the Department has the authority to state explicitly that preemption has indeed taken place. Fidelity Federal Savings & Loan Assn. v. De la Cuesta, 458 U.S. 141, 153-54 (1982). Thus, in order to remove any doubt on the subject, the Department should add a statement to the final rule that declares that regulation of CRS services shall be exclusively governed by federal law.

participation rule (sec. 255.7(b)), every system could be made less useful by competing system owners withholding information on their services. Similarly, section 255.7(a) prohibits a closely related practice which could also harm competition -- a refusal of system owners to offer equal functionality to travel agents using rival CRSs.

As important as it is, section 255.7 now applies only to "system owners". It does not specifically apply to nonowner airlines that have contracted to market a particular CRS in their country or service area. Such airlines also have an incentive to make competing CRSs less useful to agents. Where the marketing airline is a large provider of service in the region, as it often is, its refusal to provide equal functionality to agents of competitive CRSs, or to supply such CRSs with full and timely information, puts strong pressure on agents in the area to switch away from the CRS competitors.

This kind of conduct has been a significant problem for WORLDSPAN in its efforts to expand outside the U.S. As airlines "globalize" their services, CRSs must do the same, offering complete and timely information on airline services worldwide. However, they cannot compete if airlines in a marketing relationship with another CRS discriminate against them with respect to information supplied or level of participation.

In the Department's recently adopted amendment to Part 255 prohibiting "parity" provisions in participant contracts (sec. 255.6), the Department has acknowledged that the affiliation of an

airline with a CRS through a marketing agreement can produce the same discriminatory behavior as might be expected from a rival system owner. Hence, an exception to the rule was established for both owners and marketers of rival systems. The same reasoning requires comparable treatment of owners and marketers in 255.7.

E. BOOKING FEES AND CHARGING PRACTICES SHOULD NOT BE FURTHER REGULATED.

In its last CRS rulemaking, the Department concluded that regulation of booking fees would be impractical and otherwise undesirable. Nothing has happened in the last five years to warrant a different conclusion.

A few participants persist in efforts to have DOT intervene in the pricing practices of CRSs. WORLDSPAN's views on the issues they raise are as follows:

The concept of lower unit prices for a higher volume of purchases, such as volume discount pricing, is found in every corner of the economy. Lower prices for larger volume reflect how costs behave in most businesses. CRSs are a prime example. The Department recognized this in correctly declining to prohibit productivity pricing five years ago.

WORLDSPAN recognizes that certain airline pleadings have urged the Department to prohibit CRSs from charging for unproductive bookings. WORLDSPAN is not indifferent to the problem of unproductive bookings, and has cooperated with airlines in various ways to help reduce the costs of such bookings. WORLDSPAN has created products to help airlines identify sources of excess

bookings and has assisted in promoting awareness by agents of ways to avoid non-productive use of a CRS.

CRSs experience significant costs to keep the systems responsive to the needs of the industry. These costs must be recovered by a CRS. In any case, the issue involves a business pricing decision. In the environment of airline deregulation, CRS pricing decisions should not be made by the government.

F. THE DEPARTMENT SHOULD ASSURE THAT RULES RELATING TO RENEWAL AND EXTENSION OF SUBSCRIBER CONTRACTS ARE OBSERVED AND, IF NECESSARY, DOT SHOULD REVISE THE RULES TO ASSURE THEY ACHIEVE THEIR PURPOSE.

Section 255.8(a), which is designed to prevent CRSs from interfering unduly with the right of agents to switch systems, contains a five year limit on agent contracts and this anti-rollover provision:

> "No contract may contain any provision that automatically extends the contract beyond its stated date of termination, whether because of the addition or deletion of equipment or because of some other event".

WORLDSPAN is informed that Sabre interprets this provision to mean that, if additional equipment is added by a subscriber during the original term of its contract, the subscriber may be required to accept a five year contract for such equipment. Thus, a subscriber cannot terminate all its obligations to Sabre in five years unless it adds no new equipment during the five year term of the original contract. Obviously, such an interpretation of the rule creates a strong deterrent to switching CRSs -- the opposite of what the rule intends.

The rule must be read in the context of its purpose -- to prohibit contract provisions which inhibit an agent from terminating its relationship with a particular CRS after that relationship has been in effect for, at most, 5 years. [2/] The "relationship" should be viewed as beginning with the original basic contract, or its most recent renewal, between the CRS and the subscriber. Equipment additions or similar changes during a five year contract period should relate back to the date the underlying CRS-subscriber relationship was last established. Tying of equipment to mandatory contract extensions should be prohibited. The interpretation adopted by Sabre significantly waters down the effectiveness of the current rule.

Third party hardware and software: WORLDSPAN supports the goal of assuring that agents have uninhibited access to third party hardware and software. However, as the rules now recognize, there may be situations where third party products are not compatible with CRS equipment or would otherwise impair the CRS's equipment support obligations. Where compatibility and support issues are not involved, CRSs should not be permitted to restrict third party access.

[2/] In the last major rule revision, the Department found that agents should be offered contracts of no longer than 5 years, and then only if they were offered 3 year contracts at the same time. In practice, CRS price alternatives lead agents almost always to accept 5 year contracts.

G. IATFCPA TYPE PROCEDURES SHOULD BE USED TO DEAL WITH DISCRIMINATION AGAINST U.S. CRSs.

As noted in Section B above, the globalization of airline services through marketing agreements and "open skies" bilateral agreements makes it essential that U.S CRSs have their own "open skies" protection. However, many airlines of other countries have ownership or marketing affiliations with a foreign CRS. As the Department knows, WORLDSPAN has encountered competitive discrimination by such airlines in several regions. So have other CRSs, as illustrated by various IATFCPA complaints of American and United Airlines.

WORLDSPAN is very appreciative of the support it has received from the Departments of State and Transportation in dealing with discriminatory treatment by foreign governments and airlines. However, WORLDSPAN, although airline owned, is not within the corporate structure of any airline. This has raised doubts about whether a CRS, although airline owned, may invoke IATFCPA procedures on its own behalf.

A number of recently negotiated CRS bilateral agreements have included provisions banning discrimination against CRSs. These provide a solid basis for taking action under the bilateral against discriminatory practices by foreign governments or their airlines. However, most bilaterals still do not contain CRS provisions, forcing the U.S. to rely on more general bilateral guarantees of an equal opportunity for airlines to compete.

Under the circumstances, and because the IATFCPA has proved effective in other cases of discrimination, the Department should

be prepared to accept complaints under IATFCPA by CRSs themselves acting as representatives of the CRS's airline owners. In WORLDSPAN's view, this would be a reasonable interpretation of IATFCPA. If the Department does not share that view, it should create, at a minimum, expedited IATFCPA-type procedures for CRS complaints against foreign discrimination. Even without further legislation, the Department has a variety of means at its disposal, formal and informal, to obtain relief for U.S. CRSs that it finds are being discriminated against.

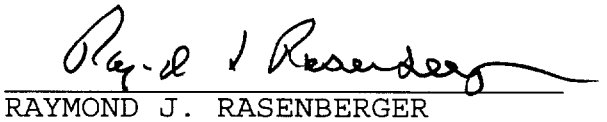
H. THE RULES SHOULD ALLOW SEPARATE ALGORITHMS FOR INTERNATIONAL FLIGHTS.

The current rules prohibit the use of different algorithms for different airlines or geographic areas. However, the Department has, by exemption, allowed limited variations in algorithms for domestic and international travel (e.g. Order 91-7-41). WORLDSPAN anticipates that it will continue to be appropriate to use a different algorithm for flights wholly within the United States and Canada than used for other flights. WORLDSPAN suggests that the revised CRS rules codify the policy reflected in the current exemptions.

I. CONTROLS ON PASSENGER INFORMATION SHOULD NOT BE ADOPTED.

The current rules call upon CRSs to make available marketing and booking information on a non-discriminatory basis. WORLDSPAN fully supports the principle underlying that rule. The wide availability of CRS-generated information helps foster a responsive and competitive market environment. For the same reason, WORLDSPAN is opposed to any change in the rules to reduce the availability of marketing and booking information on a non-discriminatory basis.

Respectfully submitted,



DOUGLAS L. ABRAMSON
DARA S. REDLER
WORLDSPAN, L.P
300 Galleria Parkway
Atlanta, Georgia 30339
(770) 563-5202

RAYMOND J. RASENBERGER
CHARLES J. SIMPSON
Zuckert, Scoutt & Rasenberger, L.L.P.
Suite 600
888 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 298-8660

Counsel for WORLDSPAN, L.P.